IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

BRIEF FOR THE PETITIONERS

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Opinions Below

The opinion of the District Court of Harris County, 164th Judicial District of Texas dated December 10, 1971 (A. 125)* has not been reported.

The opinion of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, dated May 17, 1972 (A. 125-138) is reported at 482 S. W. 2d 675.

The order of the Supreme Court of Texas, dated October 4, 1972, refusing petitioners' application for a writ of error (A. 139) was entered without opinion.

* "A" references are pages of the Joint Appendix.

Jurisdiction

The judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas was entered on May 17, 1972. Petitioners' application to the Supreme Court of Texas for a writ of error was denied by order dated October 4, 1972. After being granted an extension of time in which to file a petition for a writ of certiorari by order dated December 8, 1972, Petitioners filed their petition on January 31, 1973. A writ of certiorari was granted on June 4, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Questions Presented

1. Whether the State Court erred in holding that its jurisdiction was pre-empted by the Labor Management Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. §§141-187 ("the Labor Act") and that it could thus not adjudicate petitions filed by foreign shipowners for injunctive relief against picketing by American unions directed against foreign ships engaged in international trade, employing foreign crews working under foreign articles of agreement and represented by foreign unions and paid under foreign collective bargaining agreements, a stated object of which was to protest that the wages of such crews are substandard when compared to the wages of American crews on American ships and an intended and actual effect of which was to cause longshoremen and others not to cross the picket lines and thus to prevent such ships from loading or unloading cargo in an American port unless the wages of their crews were raised to American levels.

2. Whether the State Court erred in applying the rule in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) that "[w]hen an activity is arguably subject to

Section 7 or Section 8 of the Act (the Labor Act), the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . .", *Id.* at 245 in a case which involved a dispute between foreign owners of foreign ships and American unions in which the latter were protesting the wage levels of the foreign crews on such ships, where this Court has held in *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957), *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963) and *Incres S.S. Co.* v. *International Maritime Workers Union,* 372 U. S. 24 (1963) that the Labor Act does not apply to disputes which relate to the internal affairs of foreign ships.

Statutes Involved

Petitioners contend that the Labor Act does not extend to the regulation of disputes between American unions and the owners of foreign ships which relate to the internal affairs of such ships. Sections 141, 151, 157 and 158 of the Labor Act are reprinted in an Appendix to this Brief.

Statement of the Case

The Parties

Petitioner Windward Shipping (London) Limited is a British corporation and is managing agent of the S.S. THEOMANA (A. 16-17). Petitioner SPS Bulkcarriers Corp. is a Liberian corporation and owner of the S.S. THEOMANA (A. 16). Petitioner Westwind Africa Line, Ltd. is a Liberian corporation and owner of the S.S. NORTHWIND (A. 16). Respondents are American unions representing licensed and unlicensed seamen (A. 4-5, 9-10).

The Vessels and Their Crews

The S.S. THEOMANA and S.S. NORTHWIND are registered under the laws of Liberia and fly the Liberian flag (A. 16). The S.S. THEOMANA is a bulk carrier carrying bulk cargo and general cargo. The S.S. NORTHWIND is a dry cargo vessel (A. 17). The vessels are engaged in carrying cargo in international trade and do not carry cargo between United States ports (A. 16). The officers and crews of the vessels are all foreign nationals working under foreign articles of agreement and they are represented by foreign unions (A. 18-20, 22). The wages and other terms and conditions of employment of the crew members are governed by the articles of agreement and by collective bargaining agreements with the foreign unions (A. 18-20, 24-25). None of the officers or crews on the vessels is represented by any of the Respondents (A. 24).

The Picketing and Its Consequences

On October 23, 1971, the S.S. THEOMANA docked in the port of Houston, Texas to load a cargo for Bandar Shahpur, Iran. Loading of the vessel began the following day and continued until the evening of October 28, when members of Respondent unions began picketing at the gangway of the ship. Thereafter, longshoremen refused to cross the picket line, and the loading could not be completed (A. 38-41, Original Record, part 2A, page 70).

The S.S. NORTHWIND docked at Houston on the morning of October 29, 1971 to off-load a part cargo of coffee and to load a cargo of grain for Nigeria (A. 27, 31-33). Loading began within a few hours of the ship's arrival and continued until afternoon, when members of Respond-

ent unions began to picket at the gangway. Longshoremen thereafter refused to cross the picket line, and the ship was prevented from continuing to load the grain or to off load the coffee (A. 31-35). Because it was only partly loaded, the S.S. NORTHWIND was unseaworthy and could not sail (A. 34-35).

At a hearing on November 9, 1971, stipulations were made to the effect that the Respondents would permit certain limited work to be done for the ships so that they could be made seaworthy and able to sail, but without loading their intended cargoes, that the ships intended to call at United States ports in the future and that if they did they would be picketed again by the Respondents (A. 43-45).

The Purpose of the Picketing and the Nature of the Dispute

The picketing was carried on jointly by members of the Respondent unions. It was intended to and did have the effect of causing longshoremen and others engaged in unloading and loading the vessels to refuse to cross the picket lines and thus to prevent the completion of the unloading and loading of the vessels. (A. 17-18, 28-29, 78-79).

The pickets carried picket signs which read:

> "Attention to the public—The wages and benefits paid seamen aboard the vessel THEOMANA (NORTHWIND) are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seaman. We have no dispute with any other vessel on this site" (A. 17).

The pickets also carried and passed out leaflets which read:

> "To the Public—American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.
>
> "American dollars flowing to these foreign shipowners at wages and benefits substandard to American Seamen are hurting our balance of payments in addition to hurting our economy by the loss of jobs.
>
> "A strong American Merchant Marine is essential to our National defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.
>
> "PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.
>
> "Our dispute is limited to the vessel picketed at this site, the S.S. " (A. 21).

The picketing involved in the case at bar was planned at a joint meeting of the American seamen's unions held on October 27, 1971 where it was determined to conduct "peaceful publicity picketing of foreign flag vessels engaged in transporting American sea-borne commerce from and to American ports" (minutes of meeting of American seamen's unions representatives, Defendants' Exhibit D-8, p. 3 (not reprinted), A. 68-75), and was related to contemporaneous picketing carried out against other foreign flag ships in Houston and in other U. S. ports (A. 75-76, 86).

The pickets were instructed in advance by the Respondent unions and the attorneys representing them not to reply to any questions concerning the purpose of the

picketing but merely to carry the signs and pass out the leaflets. These instructions were followed, and the picketing was peaceful (A. 94-95, 98, 104-107, 112-113).

A union witness testified at the trial that the object of the picketing was to get the foreign flag owners to increase the wages and improve the working conditions of the crews on the foreign flag ships so that American operators employing more highly paid American seamen would be more competitive with the foreign ships (A. 100-101). Another union witness, asked whether Respondents would have achieved their goal and would have ceased their publicity activities if the foreign flag operators had realized that they should pay their crews the same wages and benefits which American seamen receive and cause their ships to have American seamen's standard working conditions, testified that this was so (A. 81-82).

Notwithstanding the purposes and goals of the picketing, there is no evidence that the crews on board the vessels were not being paid in accordance with the vessels' articles of agreement and the various wage agreements signed with the foreign unions representing them. Moreover, there is no evidence that any of the Respondents contacted the Petitioners with a request to be recognized as the collective bargaining representative of the crews on the ships (A. 47-48).

There was considerable testimony introduced by the Respondents to the effect that foreign ships enjoy a cost advantage over American ships because the wage levels on foreign ships are lower than those on American ships, that this tends to make American ships uncompetitive with foreign ships and that over the years there has been a substantial decline in the number of American ships at sea and correspondingly in the number of jobs available to American seamen (A. 55-60, 99-100, 121-122).

There was also considerable testimony offered by the Respondents to the effect that the picketing was "publicity" picketing intended to protect the jobs of American seamen by calling to the attention of the public the loss of American jobs to foreign ships employing foreign seamen at wages which are "substandard" when compared to American wages, to request public support and cooperation and to ask the public to patronize American ships (A. 17-18, 70-72, 76-78, 82-84). It was also testified that the purpose of the picketing was to obtain more cargo for American flag vessels (A. 78).

Nevertheless, Respondents' action took the form of picketing the ships and handing out leaflets at shipside with the intention and expectation of causing longshoremen and others who were to perform services for the ships not to cross the picket lines and not to perform such services. In this respect the picketing was successful, because longshoremen did not cross the picket lines and the loading and unloading of the ships could not be accomplished (A. 31-34, 38-41, 78-79, 85). Moreover, so far as the record indicates, the only action which Petitioners could have taken to cause the pickets to be withdrawn was to increase the wages and benefits of the crews on their ships to American levels. (A. 81-82).

The Litigation

On October 30, 1971, Petitioners Windward Shipping (London) Limited and SPS Bulkcarriers Corp. filed an action in the District Court of Harris County, Texas, seeking temporary and permanent injunctive relief against Respondents' picketing.* That same day Petitioner West-

* On October 29, 1971, Petitioner Windward Shipping (London) Limited filed a charge with the NLRB alleging that certain activities of the Respondents directed against Rogers Terminal and Shipping Corporation were in violation of Section 8(b) (4) (B) of the Labor Act. The charge was withdrawn voluntarily on November 8, 1971 (A. 13-15, 23-24).

wind Africa Line, Ltd. filed a similar action. On November 8, 1971, Petitioners filed amended complaints in their respective actions, alleging, *inter alia*, that the picketing by Respondents was in violation of Article 5154d, Section 4, Texas Revised Civil Statutes, and that such picketing was an intentional tort. (A. 5-6) Respondents' answer alleged in part that the matters alleged by the Petitioners were within the jurisdiction of the NLRB and that the jurisdiction of the Texas state court was thus pre-empted. (A. 10-11)

The cases, consolidated by agreement of the parties, came on for hearing in the District Court on November 8, 1971. By agreement of the parties, the cases were tried on the merits as applications for permanent injunctive relief (A. 45). On December 10, 1971, the District Court entered a judgment of dismissal on the ground that the issues raised in the case were arguably subject to the exclusive jurisdiction of the NLRB and that the Texas court's jurisdiction was pre-empted (A. 125). The District Court did not decide other issues.

Petitioners appealed to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. (A. 125) The Republic of Liberia sought and obtained permission to appear as *amicus curiae* and filed a brief. (Original Record, part 6) In an opinion dated May 17, 1972, the Court of Civil Appeals affirmed the judgment of the District Court on the same pre-emption grounds and, like the District Court, did not discuss other issues. (A. 125-138) Petitioners moved for a rehearing, which was denied, and thereafter applied to the Supreme Court of Texas for a writ of error, which was refused (A. 139). The petition for a writ of certiorari was filed on January 31, 1973 and was granted on June 4, 1973.

Summary of Argument

The State Court disregarded or misconstrued controlling decisions of this Court in holding that its jurisdiction over a dispute between American unions and foreign ships, which involved picketing of the ships to protest that the wages paid to their foreign crews were "substandard" when compared to the wages paid American seamen on American ships, was pre-empted. This Court stated in *Benz* that the whole background of the Labor Act is concerned with industrial strife between American employers and American employees; in *McCulloch* this Court answered in the negative the question of whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen; and in both *Benz* and *Incres* this Court held that the Labor Act does not govern picketing of a foreign ship manned by foreign seamen while the vessel is temporarily in an American port in a dispute which relates to the internal affairs of the ship.

If there was any doubt remaining after the Court's decisions in *Benz, McCulloch* and *Incres,* it was dispelled in *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Company,* 397 U. S. 195 (1970) which reaffirmed that the question which is determinative of the applicability of the Labor Act is "whether the . . . activities . . . were within the 'maritime operations of foreign flag ships' which *McCulloch, Incres,* and *Benz* found to be beyond the scope of the (Labor) Act" 397 U. S. at 200. Here, in contrast to *Ariadne,* Respondents were picketing in protest of the wage levels paid to foreign crews of foreign ships, a matter plainly within the maritime operations of the foreign ships.

As was held in *Benz* and *Incres*, it follows from the fact that the Labor Act does not apply that the picketing is not protected by Section 7 of that Act. Section 7 of the Labor Act does not purport to regulate picketing separately or independently of the other provisions of the Act. There exists no basis for giving the Act an interpretation which would accord to American unions a right protected by Section 7 to picket foreign ships engaged in international commerce, and thus prevent them from being loaded or unloaded when they visit American ports, when the overall regulation of labor relations and disputes relating to such ships is beyond the scope of the Act. Such an interpretation would involve a dismemberment of the Act.

The effect of an interpretation of the Labor Act which accorded American unions a federally protected right to conduct protest picketing against foreign ships whose wage levels are below those on American ships and thus to prevent them from loading or unloading cargo in American ports would be to increase rather than mitigate burdens to the free flow of commerce and would conflict with the very purposes of the Act as expressed in Sections 141 and 151 of the Act, 29 U. S. C. §§141, 151. It would also be inconsistent with principles of international law and treaties regarding the right of foreign vessels to trade freely to and from American ports.

The United States has embarked on a major program of assistance to the U. S. flag merchant marine through operating differential subsidies which offset the competitive disadvantage of American ships due to their higher wage costs, construction subsidies which offset the cost differential of building ships in the United States and abroad, and tax and other advantages. There is no basis in the Labor Act or elsewhere for attributing to Congress an intent to give unions a federally protected right to

bar foreign ships from our shores by unilateral picketing action because their wage costs are lower than those on American ships.

This Court in *Benz* and *McCulloch* noted that it ought not to give the Labor Act an interpretation which made it applicable to disputes which relate to the internal affairs of foreign ships without the clearly expressed intention of Congress in view of the potential embarassment to our foreign relations and the risk of retaliation against American ships. The danger of adverse international reaction is self-evident if the Act were interpreted as giving American unions a federally protected right to utilize picketing to bar foreign ships from our shores because their crews are not paid at American wage levels, particularly where, as here, a purpose of so doing is to gain more cargo for American flag ships.

The "arguably subject" rule of *Garmon* should not have been applied by the state court in this case, not only because the previous decisions of this Court in *Benz*, *McCulloch*, *Incres* and *Ariadne* have removed any arguability, but also because no danger of state interference with national policy of the sort with which this Court expressed concern in *Garmon* would result from a state court making an initial determination of whether the Act applies in a dispute involving the internal affairs of a foreign ship. The view expressed in the concurring opinions in *Ariadne* and *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 227 (1970) and the dissenting opinions in *Amalgamated Ass'n. of Street Employees* v. *Lockridge*, 403 U. S. 274, 302, 309 (1971) should be adopted by this Court where, as here, the initial question is not one of whether particular conduct of parties to a dispute between entities whose overall labor relations are governed by the Labor Act is protected, but rather one of whether the Act applies at all.

ARGUMENT

I. *Benz, McCulloch & Incres* hold that the Labor Act does not apply to labor disputes which relate to the internal affairs of foreign ships.

This Court has decided the issue of whether the Labor Act applies to disputes between American unions and foreign ships which relate to the internal affairs of such ships.

In *Benz* this Court stated that the question presented was ". . . whether the Labor Management Relations Act of 1947 applies to a controversy involving . . . the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port", 353 U. S. at 138-139, and held that it does not. The picketing by American unions in that case had as an object compelling the shipowner to re-employ crew members at more favorable wage rates than those agreed upon in the ships articles.* In *Benz*, as in

* Significantly, one of the defendant union's contentions of fact, as set forth in the pre-trial order of the U. S. District Court in the *Benz* case, reflected an almost identical goal or justification for the picketing as that urged by Respondents in the case at bar:

> "The Sailors' Union of the Pacific and its members have an economic interest in the working conditions and wages of the seamen employed aboard the vessels engaged in said grain charter trade in which the plaintiff's vessel, the SS Riviera, was engaged; that the low wages and poor working conditions under which the plaintiff operated and continued to operate its vessel tended to undermine and destroy the standards set up and maintained by the Sailors' Union of the Pacific and other maritime unions who have members engaged in said trade; that as a result of the methods of operation by the plaintiff and by other shipowners operating in a similar manner, the plaintiff has been, and still is, able to underbid American shipowners for charters in said trade, and members of the Sailors' Union of the Pacific have been, and are now, deprived of employment in said grain charter trade." *Benz*, Supreme Court Record, p. 26.

the case at bar the dispute related to the internal affairs of the ship, *i. e.*, the wages of the crew, and the Labor Act was held inapplicable to picketing by American unions in connection with such a dispute. The fact that a dispute also existed between the crew and the shipowner in *Benz* and not, so far as the record reveals, in the case at bar is not, we submit, a material distinction. It was the applicability of the Act to picketing by an American union which was in question in *Benz*, as here.

In *Incres* this Court stated that having held in *McCulloch* that the Labor Act has no application to the operations of foreign flag ships employing alien crews, "[t]herefore no different result as to Board jurisdiction follows from the fact that our immediate concern here is the picketing of a foreign-flag ship by an American union." 372 U. S. at 27.

The purpose of the picketing of foreign ships by American unions in *Incres* was both organizational and to protest "substandard" wages and working conditions on the ships. In *Incres* as here the unions urged from the outset that the picketing was protected because the foreign ships being picketed were in competition with American ships under contract with American unions, because the terms and conditions of employment on such ships were inferior to those of American ships, making the foreign shipowner's labor costs substantially lower than the labor costs of American ships, and because the differential in labor costs operated to the competitive disadvantage of American shipowners whose crews are represented by American unions. See *Incres*, Supreme Court Record, page 33, Defendant's amended answer, pars. 26, 28, 29.

These cases clearly held that the Labor Act is not applicable to, and thus neither protects nor prohibits, picketing of a foreign ship by an American union where the picketing is concerned with internal employer-employee relationships on such ship.

This Court emphasized in *Incres* that its decision in *Teamsters Union* v. *New York, N.H. & H.R. Co.*, 350 U. S. 155 (1956) ("the *Piggyback* case") does not lead to a contrary conclusion. In that case a railroad, whose labor relations were regulated by the Railway Labor Act, sought relief in a state court against picketing by the Teamsters Union which protested the policy adopted by trucking companies of "piggybacking" truck trailers on railroad cars. This Court pointed out in *Incres* that it was fundamental to the decision in the *Piggyback* case, which held the state court to be pre-empted by reason of the Labor Act, that the action was brought by the railroad in "circumstances unrelated to its employer-employee relations" in a situation where the union "was in no way concerned with (the railroad's) labor policy" 372 U. S. at 27.

Here the picketing was to protest "substandard" wages paid to the crews of the foreign ships as established by the ships' articles of agreement and was thus directly concerned with the foreign ships' labor policy. In addition we note that the considerations involved in this Court's decision in the *Piggyback* case, which involved reconciling a possible conflict between two American labor statutes, were quite different from those which are involved in determining whether an American statute applies to foreign ships.

If there was any doubt of what was intended in the *Benz, McCulloch* and *Incres* decisions, this Court's opinion in *Ariadne* removed it. There the American union was

picketing to protest "substandard" wages paid to American longshoremen hired in an American port to load foreign ships. This Court stated that the critical question to be answered in determining whether the Labor Act applied to the dispute was "whether the longshore activities of such American residents were within the 'maritime operations of foreign-flag ships' which *McCulloch, Incres,* and *Benz* found to be beyond the scope of the Act" and held the Act to be applicable because "[t]he American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order' ", 397 U. S. at 200. This Court emphasized that "There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on respondents' vessels." 397 U. S. at 199-200.*

Just as it was plain that there was no involvement with the maritime operations of the ships or with their internal order on the part of the American longshoremen, whose "substandard" wage scales were the basis of the dispute in *Ariadne* and the cause of the foreign ships being subjected to protest picketing in that case, it is equally plain that the activities of the foreign crews, whose "substandard" wage scales were the basis of the dispute in the case at bar and the cause of the foreign ships being subjected to protest picketing, are at the heart of the maritime operations of the ships on which they serve. We submit that this Court's opinion in *Ariadne* makes

* This Court in a footnote, "put to one side situations in which the longshore work, although involving activities on an American dock, is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles." 397 U. S. at 199.

it quite clear that picketing in connection with such a dispute is not governed by the Labor Act.

II. The Labor Act should not be interpreted to give Respondents a federally protected right to bar foreign ships from United States ports by protest picketing concerned with the level of wages paid to their crews.

A. The Arguably Protected Status of Area Standards Picketing in Domestic Disputes Does Not Apply Here Where There Are Important Factors to Be Considered Not Present in Domestic Disputes

Respondents argued below and the Texas Court found that the picketing was arguably protected by Section 7 of the Labor Act, citing *Ariadne* for the proposition that a union's peaceful picketing to protest wage rates below established area standards arguably constitutes protected activity under Section 7.*

We submit that this Court was at pains to make it clear in *Ariadne* itself that the arguably protected status of so-called "area standards" picketing, (see *International Hod Carriers Union, Local No. 41, (Calumet Contractors Ass'n), 133 NLRB No. 57 (1961) and Houston Building and Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB No. 28 (1962)) is not applicable where the dispute relates to the internal affairs of foreign flag ships. It was determined in *Benz* and *Incres* that picketing conducted by American unions in disputes which relate to internal affairs of foreign ships is not protected by Section 7 because the Labor Act is not applicable. It

* The legality or illegality under Texas law of the picketing by the Respondents was not decided by the Court below and is thus not in issue here.

was irrelevant in those cases that the picketing might have been protected had the dispute been, for example, over wages paid to American seamen on American ships and thus governed by the Labor Act.

So-called "area standards" picketing cases which have come before the NLRB have involved purely domestic disputes wherein the picketed employer filed a charge with the NLRB that the picketing had an object of organizing the employees or seeking recognition and thus fell within the union unfair labor practice provisions of sections 8 (b) (4) (C) or 8 (b) (7) (C) of the Labor Act.

The NLRB held in the *Calumet* and *Claude Everett Construction Company* cases that picketing to protest wages paid by employers which are substandard to those paid by other employers in the area whose employees are represented by the picketing union does not in and of itself amount to picketing for organizational or recognitional purposes within the meaning of sections 8 (b) (4) (C) and 8 (b) (7) (C). These cases were 3-2 decisions of the NLRB in which the minority held to the earlier view of the Board expressed in *International Hod Carriers Union, Local No. 41 (Calumet Contractors Ass'n)*, 130 NLRB 78, 81-82 (1961) that where the object of picketing is to force an employer to raise wages to the same level as those negotiated by the union with other employers in the area, the union is attempting to obtain concessions normally resulting from collective bargaining, and thus the picketing should be treated for purposes of section 8 (b) (4) (C) and 8 (b) (7) (C) as equivalent to picketing with the object of compelling an employer to bargain with the union.

These cases were not concerned with the question of pre-emption or with picketing over the level of wages

paid to foreign crews on foreign ships. Notwithstanding the current interpretation of the NLRB that a distinction exists between area standards picketing and organizational or recognitional picketing for the purposes of sections 8 (b) (4) (C) and 8 (b) (7) (C), such distinctions are irrelevant here.

B. The Policy of Congress Is to Offset By Subsidies the Competitive Disadvantage Which American Ships Suffer By Reason of Their Higher Operating Costs

We do not contest the fact that the wages of foreign crews on foreign ships are substantially lower than those paid to American seamen on American ships.* Nor do we contest the fact that as a result partly of the higher operating and other costs of American ships, the ability of American ships to compete with foreign ships in international shipping has been affected. But this whole question has been given close attention by Congress, which has taken positive action to deal with the problem on a broad scale.

It is, we believe, highly relevant that in 1970 a greatly expanded program for aiding the American merchant marine was enacted as the Merchant Marine Act of 1970, P. L. 91-469, 84 Stat. 1018 (1970).

In enacting this new maritime program, Congress recognized that "[i]n general, merchant ships of the world trade internationally in accordance with principles of

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* It has been said that the wage costs on American ships are in the area of two and one-half to four times higher than those on foreign ships and that the wages of an able bodied seamen on an American ship are, for example, only slightly below those of the captain of an Italian ship. Hearings on H. R. 12324, H. R. 12569 before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 92nd Cong., 2nd Sess., Ser. 92-21, Pt. 2 at 713, 738 (1972).

freedom of the seas and open ports," and observed: "Accordingly, U. S. merchant vessels are in direct competition with foreign flag carriers for available cargos. . . . Since for over a century American vessel construction and operating costs, reflecting the relatively higher standard of living in the United States, have generally been higher than those of other maritime nations, the American vessel operator is at a direct competitive disadvantage. . . .

"Consequently, we must accept the burden of continuing to provide some form of direct government support for our merchant fleet in foreign commerce." Senate Report No. 91-1080, 91st Congress, 2d Sess., U. S. Code Cong. and Ad. News, 1970, p. 4190.

Under the Merchant Marine Act of 1970 the United States has embarked on an extensive program designed to make American ships competitive with foreign ships. This program includes direct subsidies to American shipowners to make up the difference in the costs of operating United States flag and foreign flag vessels, construction subsidies to make up the difference between ship construction costs in the United States and abroad, and important special tax benefits.*

Congress presumably might have legislated, as part of the Merchant Marine Act of 1970, that, in order to make American flag ships competitive with foreign flag ships, only those foreign flag ships whose crews are paid at

* For a description of the scope of such program plus other forms of government assistance to the American merchant marine see Senate Report 91-1080, *supra;* "The Economics of Federal Subsidy Programs," a compendium of papers submitted to the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee, Congress of the United States, Part 6, Transportation Subsidies, February 26, 1973, pp. 763-795; "Setting National Priorities The 1972 Budget" The Brookings Institution, 1971, pp. 267-271.

American wage levels would be permitted to carry cargo to or from American ports. It did not do so. Nevertheless, Respondents are urging that this court should interpret the Labor Act as according to them a federally protected right to utilize picketing to bar foreign ships from trading in and out of our ports when in their unilateral opinion such action would help the American merchant marine. We submit that such an interpretation not only is unsupported by any legislative history indicating that the Labor Act is intended to apply to disputes which relate the internal affairs of foreign vessels (see *Benz*), but also that such an interpretation would ignore other important policies and interests of the United States, including the means that Congress has selected in the Merchant Marine Act of 1970 to aid the American merchant marine, the effect which such interference with foreign ships may have on the flow of American exports of grain and other products to world markets and on the ability of the United States to import vital raw materials, and the effect of such interferences on American ports, and on the commercial and political relationships of the United States with foreign nations. As this Court pointed out in *Benz*,

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision when the possibilities of international discord are so evident and retaliative action so certain." 353 U. S. at 147.

Certainly, we do not think that any protection which the NLRB has construed the Labor Act to give to area standards picketing should be applied to picketing related to a dispute involving "substandard" wages on foreign ships

without the intention of Congress being clearly expressed that it should be so construed. This is particularly true when Congress has enacted a substantial and unique program to offset the cost differentials between United States ships and foreign ships with subsidies and other aids.

C. The Labor Act Is an Interrelated and Interdependent Act Which Must Be Treated As a Whole.

The Labor Act is, as this Court observed in *Garmon*, "a complex and interrelated federal scheme of law, remedy, and administration" 359 U. S. at 243. It is comprised of interdependent provisions intended to form a legal framework for organizing, collective bargaining and the conduct of labor disputes which strikes a balance between employer and union interests by protecting some activities and prohibiting others. See *American Ship Building Co.* v. *NLRB*, 380 U. S. 300 at 316, 317 (1965); *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *National Labor Relations Board*, 357 U. S. 93 at 99, 100 (1958). The original Wagner Act, 49 Stat. 449 (1935) was amended in 1947 by the Taft-Hartley Act, 61 Stat. 136 (1947) in order by making unlawful certain union activities, to achieve this balance. See S. Rep. No. 105, 80th Cong. 1st Sess. 2 (1947); 93 Cong. Rec. 7537 (1947). The balance was further adjusted by the Landrum-Griffin Act in 1959 (73 Stat. 519 (1959)).

The Labor Act contemplates that picketing will in some situations be lawful and in others unlawful, but the Labor Act must be viewed as a whole, as is quite clear from this Court's decisions in *Benz*, *McCulloch*, *Incres.* and *Ariadne*, and its regulation of picketing is structured in the context of its overall regulation of the conduct of labor relations and its intended balancing of the interests of employers and employees who are subject to its provisions.

As stated earlier, *Benz, McCulloch* and *Incres* held that the Act is not applicable to disputes relating to the internal affairs of foreign ships and to the activities or conduct of the parties to such disputes. The effect of these decisions is twofold. On the one hand, for example, an American union cannot petition the NLRB to direct a representation election among the foreign crew of a foreign ship or apply for an order prohibiting a foreign shipowner from engaging in an employer unfair labor practice in violation of Section 8(a) of the Labor Act. See also *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U. S. 600 (1971). On the other hand a foreign shipowner involved in such a dispute cannot obtain relief from the NLRB against union activity which, were the Labor Act applicable, might constitute a union unfair labor practice under Section 8(b) of the Labor Act except, perhaps, in the case of his being subjected to a secondary boycott. See *Teamsters Union* v. *New York, N. H. & H. R. Co., supra.*

A foreign shipowner subjected to protest picketing is in a wholly different position from that of an American employer subjected to protest picketing whose labor relations are in every respect governed by that Act. To give an example, the NLRB, in the light of *Incres,* would clearly have no jurisdiction to proceed on a charge filed by a foreign shipowner that picketing directed against him had a bargaining or recognitional purpose and was being carried on in violation of Section 8(b)(7)(C). See also *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Ass'n.,* 382 U. S. 181 at 188 (1965). Indeed, Section 8(b)(7)(C) says that a union cannot carry on recognitional picketing for more than a reasonable time not exceeding thirty days unless a petition for an election has been filed under Section 159(c), but the NLRB would not have jurisdiction to conduct such an election, see *McCulloch.* Thus,

if this Court were to hold that picketing to protest substandard wages of a foreign crew is protected by the Labor Act, the result might be that picketing would be protected by the Labor Act if it were found not to have a bargaining or recognitional purpose, but, if the picketing violated 8(b)(4(C) or 8(b)(7)(C), the foreign shipowner would be unable to secure relief under the Labor Act, because the Labor Act would not apply. It seems self-evident that Congress could not have intended such an incongruous result. As was stated in *L. B. Wilson, Inc.* v. *FCC*, 170 F. 2d 793, 800, (D. C. Cir. 1948): "[n]othing but unmistakable language will warrant such construction of a statute as will produce unequal operation thereof." We submit that there is no basis for construing the Act in such a way that some of its provisions are applicable to regulate the conduct of the parties to a dispute when other provisions are not; we submit that the Act cannot be thus dismembered.

The fundamental purposes of the Labor Act are to alleviate and mitigate obstructions to the free flow of commerce by protecting the right of employees to form unions and bargain collectively, subject to certain restrictions as to their conduct and the conduct of employers. See 29 U. S. C. §§141, 151; *American Communications Ass'n, CIO* v. *Douds*, 339 U. S. 382, 387 (1950). Respondents seek an interpretation of the Act which would accord to them a federally protected right to picket foreign ships engaged in international trade so as to prevent them from being loaded or unloaded—in other words, a right to obstruct commerce by effectively barring such ships as they choose to picket from American ports because the seamen on board are paid less than American seamen on American ships. They seek federal protection of such picketing notwithstanding that the fundamental means by which the Labor Act seeks to mitigate obstructions to commerce, i.e., through the establishment of a legal framework for

collective bargaining as a means of avoiding such disruptions, see *American Ship Building Co.* v. *N. L. R. B., supra,* at 316, 317, is not, as this Court has found, applicable to foreign ships.

Notwithstanding that Respondents' objectives of protecting the jobs of their members and aiding the American merchant marine are perfectly valid, we submit that it would be inconsistent with the Labor Act's declared purposes to interpret the Act as affording a protected right to obstruct commerce in circumstances where, as here, all of the Act's provisions which go to provide a legal framework for the resolution of disputes through collective bargaining are not applicable.

D. Relevant Principles of International Law and Treaty Obligations Must Be Considered in Determining the Reach of the Labor Act in the Circumstances of This Case.

This Court in *Benz* was concerned not to attribute to the Labor Act a construction which would result in international discord and create the likelihood of retaliative action by foreign nations without the affirmative intention of Congress clearly expressed. 353 U. S. at 147. In *McCulloch* too this Court was concerned not to adopt any procedure which might require the NLRB to inquire into the internal discipline and order of foreign flag vessels, pointing out the risk of disturbance in our international relations which could be expected in the light of treaty and international law provisions which recognize the sovereignty of the flag state over matters relating to the internal affairs of such ships. 372 U. S. at 19-21.

We respectfully draw to the Court's attention the following passage from C. J. Colombos, The International Law of the Sea 176-177 (6th Ed. 1967):

> §181. *General principles applicable to ports.*— The right of sovereignty recognised to a State should not, in fact, be construed as conferring upon it an unlimited power to prohibit the use of its ports and harbours to foreign nationals. This would imply a neglect of its duties for the promotion of international intercourse, navigation and trade which customary international law imposes upon it. It is submitted that the general principles applicable to ports, harbours and roadsteads are capable of being summarised as follows: (i) in time of peace, commercial ports must be left open to international traffic. The liberty of access to ports granted to foreign vessels implies their right to load and unload their cargoes; enbark and disembark their passengers. This principle was reiterated by the late Professor Sauser-Hall in his award in the *Saudi-Arabia* v. *Aramco* arbitration of 1958. As he said: "according to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require. Freedom for foreign vessels to enter the ports of a State implies the right to load and unload goods."

We wish also to call to the Court's attention the Treaty of Friendship, Commerce and Navigation between the United States and Liberia, 54 Stat. 1739 (1939), relevant because the vessels involved in the case at bar are Liberian vessels. The Treaty provides generally for freedom of commerce and navigation between the two nations. Article VII states:

> "Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Con-

tracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation." 54 Stat. 1742 (1939).

Article XVI states:

"Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward. . . ." 54 Stat. 1745-46 (1939).

To construe the Labor Act as giving unions a federally protected right to bar foreign ships from our ports by picketing would, we submit, be inconsistent with the above-mentioned principles of international law and with the obligations expressed in the Treaty with Liberia.

III. The State Court erred in applying the "arguably subject" rule expressed in *Garmon*.

The Texas Court stated that its primary inquiry was whether the picketing in question was arguably prohibited or protected under the Labor Act, citing *Garmon*. We submit that the "arguably" rule expressed in *Garmon* is

inapplicable in the context of this case, not only because of the decisions of this Court which hold the Labor Act to be inapplicable to disputes which relate to the internal affairs of foreign ships, but also because this Court stated in *Garmon* itself that activities which were "a merely peripheral concern" of the Labor Act were not withdrawn from the states' power of regulation, 359 U. S. at 243, and because the application of the "arguably" rule of *Garmon* to cases in the field of foreign shipping has resulted in unnecessary litigation of the question of "arguability" without furtherance of any significant federal policy. The concurring opinions in *Ariadne* of Mr. Justice White joined in by the Chief Justice and Mr. Justice Stewart, the concurring opinion in *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 227 (1970) and the dissenting opinions in *Amalgamated Ass'n. of Street Employees* v. *Lockridge*, 403 U. S. 274, 302, 309 (1971) appear to disapprove the "arguably" rule as such. While we agree with the principles expressed in these opinions, and in particular the point that there is no effective mechanism for an employer to obtain a ruling from the NLRB as to whether or not a particular activity is protected by the Labor Act, our argument here is limited to the applicability of such a rule to cases involving disputes with foreign ships employing foreign crews which are related to the wages or working conditions of such crews, *cf. Ariadne.*

As noted earlier, this Court pointed out in *Benz* that "[t]he whole background of the Act is concerned with industrial strife between American employers and employees," 353 U. S. at 143, 144. Even if disputes involving foreign ships and foreign seamen were subject in some fashion to regulation under the Labor Act, and again we submit that they plainly are not, the need expressed in *Garmon* for initial determination by the NLRB "if the danger of state interference with national policy is to be averted," 359 U. S. at 245, would not exist. The issues in

such cases are at most not central to the regulation of industrial strife between American employers and American employees with which the Labor Act and national labor policy is concerned.

Finally, we believe that there is a fundamental distinction between a situation where both parties to a dispute are subject to American labor jurisdiction, and the question to be determined is whether or not particular conduct of the parties is either protected or prohibited by the Labor Act, and a situation, such as the present case, where the matter in issue is the threshold question of whether Congress intended the very scope and reach of the Act to extend to the conduct of parties to disputes relating to employer-employee relationships on foreign ships. In this latter area, where the possibility of causing serious problems in the relations of this country with other maritime nations is a matter of concern which this Court has recognized in its previous decisions, the NLRB has no special expertise and moreover no effective procedures for resolving the question.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas should be reversed and the case remanded for further proceedings.

Dated: August 14, 1973

Respectfully submitted,

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APPENDIX

29 U. S. C. §§ 141, 151, 157 and 158

§ 141. Short Title; Congressional Declaration of Purpose and Policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, c. 120, § 1, 61 Stat. 136.

§ 151. Findings and Declaration of Policy

The denial by some employers of the rights of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife of unrest, which have the

intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and mem-

bers have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947. c. 120, Title I, § 101, 61 Stat. 136.

§ 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

§158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the

effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry effecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object there is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain

with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the pur-

pose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an em-

ployer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 15-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract

or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, any any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined

in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title. July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII §§704(a)-(c), 705(a), 73 Stat. 525, 542, 545.